



DEPARTMENT OF ENERGY

10 CFR Part 1061

RIN 1990-AA50

Procedures for the Issuance of Guidance Documents

AGENCY: Office of General Counsel, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: In accordance with an Executive Order issued by the President on January 20, 2021, and for the reasons explained in the preamble of this proposed rule, the Department of Energy (DOE or “the Department”) proposes to withdraw the Department’s final rule on guidance implementing the Executive Order “Promoting the Rule of Law Through Improved Agency Guidance Documents.”

DATES: The final rule published January 6, 2021 at 86 FR 451, effective February 5, 2021, and delayed until June 17, 2021, is proposed to be withdrawn. DOE will accept comments regarding this notice of proposed rulemaking on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN *THE FEDERAL REGISTER*]**. See the section entitled “Public Participation” for details.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by RIN 1990-AA50, by any of the following methods:

1. *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments.

2. *Email*: Guidance@hq.doe.gov. Include the RIN 1990-AA50 in the subject line of the message.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see the section on Public Participation for details.

Docket: The docket, which includes *Federal Register* notices, comments, and other supporting documents/materials, is available for review at <http://www.regulations.gov>. All documents in the docket are listed in the <http://www.regulations.gov> index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at <http://www.regulations.gov>/ associated with RIN 1990-AA50. The docket web page contains simple instructions on how to access all documents, including public comments, in the docket. See the section on Public Participation for information on how to submit comments through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew Ring, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC-33, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586-2555, Email: Guidance@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Background

On July 1, 2020, DOE published a notice of proposed rulemaking (NPR) in which DOE proposed a new part 1061 in title 10 of the Code of Federal Regulations to implement the requirements of Executive Order 13891, “Promoting the Rule of Law Through Improved Agency

Guidance Documents” (84 FR 55235).¹ (85 FR 39495) After considering comments from stakeholders on the NOPR, DOE published a final rule, on January 6, 2021, establishing new 10 CFR part 1061. (86 FR 451) As required by Executive Order 13891, part 1061 contained internal DOE requirements for the contents of guidance documents, procedures for providing notice of, and soliciting public comment on, certain guidance documents, and procedures for the public to petition for the issuance, withdrawal or revision of guidance documents.

On January 20, 2021, the President issued Executive Order 13992, “Revocation of Certain Executive Orders Concerning Federal Regulation” (86 FR 7049), which, among other things, revoked Executive Order 13891 and directed agencies to promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing the Executive Order 13891. Executive Order 13992 states that it is the policy of the Administration to use available tools to confront the urgent challenges facing the Nation, including the coronavirus disease 2019 (COVID-19) pandemic, economic recovery, racial justice, and climate change. To tackle these challenges effectively, executive departments and agencies must be equipped with the flexibility to use robust regulatory action to address national priorities. This order revokes harmful policies and directives that threaten to frustrate the Federal Government's ability to confront these problems, and empowers agencies to use appropriate regulatory tools to achieve these goals.

Previously, DOE postponed the effective date of part 1061 until March 21, 2021. (86 FR 7799) DOE issued the extension consistent with the memorandum issued on January 20, 2021 by the Assistant to the President and Chief of Staff (“Chief of Staff”) outlining the President’s plan for managing the Federal regulatory process at the outset of the new Administration and for

¹ In the NOPR, DOE also responded to a petition for rulemaking submitted by the New Civil Liberties Alliance (NCLA) asking DOE to initiate a rulemaking to prohibit any DOE component from issuing, relying on, or defending improper agency guidance. DOE granted the petition in part and denied it in part. (85 FR 39497)

the reasons described in EO 13992. DOE sought comment on further delay of the effective date, including the impacts of such delay, as well as comment on the legal, factual, or policy issues raised by the rule. DOE did not receive comments on these issues. Accordingly, DOE has further extended the effective date of this rule to June 17, 2021. (86 FR 14807)

II. Discussion

After consideration and review, DOE has tentatively concluded that part 1061 will hinder DOE in providing timely guidance in furtherance of DOE's statutory duties. The final rule will in particular hinder DOE's ability to address the economic recovery and climate change challenges enumerated in Executive Order 13992. As discussed in the Executive Order, agencies must have flexibility to timely and effectively address these challenges. The procedures of part 1061 are not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), and they limit the regulatory tools available to DOE to address the challenges listed in Executive Order 13992. Part 1061 deprives DOE of flexibility in determining when and how best to issue guidance based on particular facts and circumstances, and restricts DOE's ability to provide timely guidance on which the public can confidently rely.

In addition, DOE's stated purpose in issuing part 1061 was to promote transparency and public involvement in the development and amendment of DOE guidance documents. DOE notes, however, that its procedures for public transparency and involvement in the development of agency guidance documents will remain unchanged by withdrawal of part 1061. DOE guidance documents will continue to be available on DOE's website. DOE will also continue its practice, as appropriate, of soliciting stakeholder input on guidance documents of significant stakeholder and public interest. Additionally, stakeholders may still petition DOE at any time to issue, withdraw or revise DOE guidance documents, or inquire about DOE guidance documents, by emailing petitions or inquiries to Guidance@hq.doe.gov. The benefits of binding DOE to the

procedures of part 1061 therefore appear outweighed by the need for DOE to have the ability to issue guidance timely and effectively to address the challenges listed in the Executive Order, and to otherwise meet DOE's statutory duties. Moreover, DOE notes that guidance, whether issued under part 1061 or otherwise, is non-binding, and does not have the force and effect of law.

Therefore, in accordance with Executive Order 13992 and for the reasons stated above, DOE proposes to rescind its internal agency procedures for issuing guidance documents published at 10 CFR part 1061.

Public Participation

DOE will accept comments, data, and information regarding this proposed rule on or before the date provided in the **DATES** section at the beginning of this document. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

Submitting comments via <http://www.regulations.gov>. The <http://www.regulations.gov> web page will require you to provide your name and contact information. Your contact information will be viewable to DOE General Counsel staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not

want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to <http://www.regulations.gov> information the disclosure of which is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through <http://www.regulations.gov> cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section below.

DOE processes submissions made through <http://www.regulations.gov> before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that <http://www.regulations.gov> provides after you have successfully uploaded your comment.

Submitting comments via email. Comments and documents submitted via email will be posted to <http://www.regulations.gov>. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, or optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email two well-marked copies: One copy of the document marked “confidential” including all the information believed to be confidential, and one copy of the document marked “non-confidential” that deletes the information believed to be confidential. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and will treat it according to its determination.

It is DOE's policy that all comments, including any personal information provided in the comments, may be included in the public docket, without change and as received, except for information deemed to be exempt from public disclosure.

Regulatory Analysis

A. Review Under Executive Order 12866, “Regulatory Planning and Review”

This proposed rule is not a “significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review.” 58 FR 51735 (October 4, 1993). As a result, this action was not reviewed by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). DOE does not anticipate that this rulemaking will have an economic impact on regulated entities. This is a proposed rule of agency procedure and practice. This proposed rule would repeal the regulations governing DOE’s internal procedures for the promulgation and processing of guidance documents. DOE proposes to repeal these internal procedures as part of its implementation of Executive Order 13992 and does not anticipate incurring significant additional resource costs in doing so.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires the preparation of an initial regulatory flexibility analysis (IRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process, 68 FR 7990. The Department has made its procedures and policies available on the Office of General Counsel's web site: <http://energy.gov/gc/office-general-counsel>.

This proposed rule would repeal internal agency procedures regarding DOE’s issuance of guidance documents. DOE notes, however, that its procedures for public transparency and involvement in the development of agency guidance documents will remain unchanged by the

withdrawal. DOE guidance documents will continue to be available on DOE's website. DOE will also continue its practice, as appropriate, of soliciting stakeholder input on guidance documents of significant stakeholder and public interest. Additionally, stakeholders may still petition DOE at any time to issue, withdraw or revise DOE guidance documents, or inquire about DOE guidance documents, by emailing petitions or inquiries to *Guidance@hq.doe.gov*. The benefits of binding DOE to the procedures of part 1061 therefore appear outweighed by the need for DOE to have the ability to issue guidance timely and effectively to address the challenges listed in the Executive Order. Moreover, DOE notes that guidance, whether issued under part 1061 or otherwise, is non-binding, and does not have the force and effect of law. DOE therefore does not anticipate any significant economic impacts from today's proposed rule. For these reasons, DOE certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE did not prepare an IRFA for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

This proposed rule would impose no new information or record keeping requirements. Accordingly, Office of Management and Budget (OMB) clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 et seq).

D. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act (NEPA) and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule

or regulation being amended. 10 CFR part 1021, Subpart D, Appendix A5. DOE anticipates that this rulemaking qualifies for categorical exclusion A5 because it is a rulemaking that amends a rule and does not change the environmental effect of the rule and otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final rule.

E. Review under Executive Order 13132, “Federalism”

Executive Order 13132, “Federalism,” 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. (65 FR 13735) DOE examined this proposed rule and determined that it would not preempt State law and would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of Government. No further action is required by Executive Order 13132.

F. Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 FR 67249, November 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes,

on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175. Because this proposed rule would not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

G. Review Under Executive Order 12988, “Civil Justice Reform”

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform,” 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct, rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies its preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) specifies its retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule would meet the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a) and (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed “significant intergovernmental mandate” and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at <http://energy.gov/gc/office-general-counsel>). This proposed rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of \$100 million or more in any year by State, local, and tribal governments, in the aggregate, or by the private sector, so these requirements under the Unfunded Mandates Reform Act do not apply.

I. Review Under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105-277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630, “Governmental Actions and Interference With Constitutionally Protected Property Rights”

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), that this proposed rule would not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

K. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use”

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the

Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. The proposed rule would repeal internal agency procedures and does not meet any of the three criteria listed above. Accordingly, the requirements of Executive Order 13211 do not apply.

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Part 1061

Administrative practice and procedure.

Signing Authority

This document of the Department of Energy was signed on March 23, 2021, by John T. Lucas, Acting General Counsel, Office of the General Counsel, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on March 23, 2021

Treena V. Garrett
Federal Register Liaison Officer,
U.S. Department of Energy

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